



CITY OF LODI

COUNCIL COMMUNICATION

AGENDA TITLE: Adoption of Comprehensive Municipal Environmental Response and Liability Ordinance

MEETING DATE: August 6, 1997

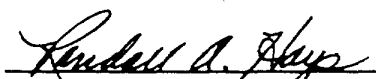
PREPARED BY: City Attorney

RECOMMENDATION: That the City Council adopt the Ordinance titled Comprehensive Municipal Environmental Response and Liability Ordinance which would establish Chapter 8.24 in the Lodi Municipal Code.

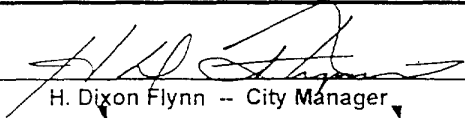
BACKGROUND: At the July 16, 1997 City Council meeting, the Comprehensive Municipal Environmental Response and Liability Ordinance was introduced. As explained at that time, the ordinance that is before you for adoption this evening establishes a comprehensive cleanup and enforcement ordinance directed at toxic chemicals. The adoption of this ordinance at the local level is based upon existing state and federal laws. The ordinance however is one of local origination, which provides us with strong local control relative to those substances, which can harm our environment in various ways. As previously indicated, staff believes that this is an important addition to our arsenal in the long term relative to handling existing problems as well as being able to address future problems that might develop.

FUNDING: Not applicable.

Respectfully submitted,


Randall A. Hays, City Attorney

APPROVED: _____


H. Dixon Flynn -- City Manager

ORDINANCE NO. 1650

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF LODI
AMENDING TITLE 8, HEALTH AND SAFETY, THEREBY CREATING
CHAPTER 8.24 OF THE LODI MUNICIPAL CODE
ENTITLED HEALTH AND SANITATION

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BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF LODI AS FOLLOWS:

Section 1. Lodi Municipal Code Title 8 - Health and Safety - Comprehensive Municipal
Environmental Response & Liability Ordinance

Title 8
HEALTH AND SANITATION
Chapter 8.24
Comprehensive Municipal
Environmental Response & Liability Ordinance

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- C. - Recovery of Abatement Costs
- D. - Standard of Liability
- E. - Scope of Liability
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SECTION 8.24.010 DEFINITIONS

Unless otherwise expressly stated, whenever used in this Chapter, the following terms shall have the meanings set forth below:

(1) The term "Abatement Action" shall mean any of the following activities that the Enforcing Officer determines are or may be necessary to respond to an existing or threatened Environmental Nuisance:

(a) to comprehensively investigate, study, analyze, or assess the nature and extent of any known or suspected Environmental Nuisance, including, but not limited to, any known or potential endangerments to the public health, welfare, or the Environment resulting from or contributed to by such Environmental Nuisance within or affecting the City of Lodi, as well as any and all resulting damages to any Natural Resources owned by, controlled by, or appertaining to the City of Lodi;

(b) to comprehensively investigate, analyze, or assess the causes and effects of any Environmental Nuisance within the City of Lodi or affecting the City of Lodi;

(c) to analyze and select the suitable technology, to assess the qualifications of and hire the technical, legal, and scientific personnel determined by the Enforcing Officer to be necessary or appropriate to the conduct of a Remedial Investigation by the City of Lodi, and to create, develop and finalize the comprehensive work plan to implement a comprehensive Remedial Investigation;

(d) to analyze and select the suitable technology, to assess the qualifications of and hire the technical, legal, and scientific personnel determined by the Enforcing Officer to be necessary or appropriate to the conduct of a Feasibility Study (including any necessary or appropriate Endangerment Analysis or Treatability Studies) by the City of Lodi, and to create, develop and finalize the comprehensive work plan to implement a comprehensive Feasibility Study;

(e) to develop and implement an Environmental Nuisance abatement plan that adequately protects or restores to the maximum extent practicable the public health, safety, welfare, Environment, Natural Resources, and current and potential beneficial uses of the Environment, including the abatement of all known or potential endangerments to public health, welfare or the Environment;

(f) to protect against any actual or suspected existing or threatened endangerment of any consequence warranting a response to assure adequate protection of the public health, welfare, or the Environment, which endangerment was caused or contributed to in whole or in part by an Environmental Nuisance within the City of Lodi or affecting the City of Lodi;

(g) to implement and to evaluate the effectiveness of any of the activities listed in subparagraphs (1)(a) through (1)(f) above;

(h) to completely oversee and monitor the performance of any of the activities described in subparagraphs (1)(a) through (1)(g) of this section by a Responsible Party in response to any Environmental Nuisance within the City of Lodi; and

(i) to develop and implement public information and public relations programs consistent with the requirements of this Ordinance and determined necessary or appropriate by

the Enforcing Officer to keep the public informed about, and to allow public input and participation in significant activities designed to respond to, Environmental Nuisances having any significant bearing on the public health or the Environment within the City of Lodi; and

(j) to coordinate and cooperate with the lawful actions of appropriate agencies of federal, state and county government in responding to any Environmental Nuisance, and to pay, as determined appropriate by the City Counsel, some or all of the costs of oversight and involvement by any such governmental agencies for any Environmental Nuisance in which the City of Lodi is a responding agency or in which it is acting as lead agency.

(2) The term "Abatement Action Costs" shall mean any and all legal, technical and/or administrative fees and costs incurred by the City of Lodi in performing or preparing to perform an Abatement Action in compliance with the requirements of this Ordinance. The term "Abatement Action Costs" shall specifically include, but shall not be limited to, any and all costs incurred by the City of Lodi for expert assistance in health, engineering and environmental science, expert witness services and legal fees (including, but not limited to, internal costs of the City Attorney's Office or outside legal counsel deemed necessary at the sole discretion of the City of Lodi) to study, investigate, abate, remove, remediate or respond to an Environmental Nuisance; to respond to the existence, or threat of an Environmental Nuisance; to monitor, assess or evaluate an Environmental Nuisance; or to prevent, minimize, or mitigate an Environmental Nuisance or to undertake necessary enforcement activity in response to an Environmental Nuisance. The amounts recoverable as Abatement Action Costs shall also expressly include interest on the amounts recoverable. Such interest shall accrue at the rate of ten (10%) percent per annum compounded daily from the later of the date payment of a specified amount is demanded in writing, or the date of the expenditure concerned.

(3) The term "Contractual Relationship" :

(a) for the purpose of section 8.024.040(B)(3) of this Chapter, includes, but is not limited to, land contracts, deeds or other instruments transferring title or possession, unless the real property on which the facility concerned is located was acquired by the defendant after the disposal or placement of the Hazardous Substance, Pollutant or Waste on, in, or at the facility, and one or more of the circumstances described in clause (i), (ii), or (iii) is also established by the defendant by clear and convincing evidence:

- (i) At the time the defendant acquired the facility, the defendant did not know and had no reason to know that any Hazardous Substance, Pollutant or Waste which is the subject of the release or threatened release was disposed of on, in, or at the facility.
- (ii) The defendant is a government entity which acquired the facility by escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation.
- (iii) The defendant acquired the facility by inheritance or bequest.

In addition to establishing the foregoing, the defendant must establish that he has satisfied the requirements of section 8.024.040(B)(3)(a) and (b) of this Chapter.

(b) To establish that the defendant had no reason to know, as provided in

clause (i) of subparagraph (a) of this paragraph, the defendant must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability. For purposes of the preceding sentence, the court shall take into account any specialized knowledge or experience on the part of the defendant, the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination on, at or around the property, and the ability to detect such contamination by appropriate inspection. To establish that the defendant had no reason to know, as provided in clause (i) of subparagraph (a) of this paragraph, a defendant who acquired commercial property must establish: (i) that he identified the existence or actual operation on the commercial property within the twenty (20) year period immediately preceding the defendant's acquisition of the commercial property of every owner or tenant engaged in a business or industry known to routinely use Hazardous Substances in the operation of such business or industry, or that the identification of any such tenant was legally impossible; and (ii) conduct a complete, commercially reasonable environmental investigation of the area that may have been impacted by operation of any such business or industry to ascertain the likely presence in the Environment and likely impact on the public health or the Environment of any Hazardous Substances or Pollutants which may have been released from the operation of such business or industry.

(c) Nothing in this paragraph or in section 8.024.040(B)(3) of this Chapter shall diminish the liability of any previous owner or operator of such facility who would otherwise be liable under this chapter. Notwithstanding this paragraph, if the defendant obtained actual knowledge of the release or threatened release of a Hazardous Substance, Pollutant or Waste at such facility when the defendant owned the real property and then subsequently transferred ownership of the property to another person without disclosing such knowledge, such defendant shall be treated as liable under section 8.024.040(A) of this title and no defense under section 8.024.040(B)(3) of this Chapter shall be available to such defendant.

(d) Nothing in this paragraph shall affect the liability under this Chapter of a defendant who, by any act or omission, caused or contributed to the release or threatened Release of a Hazardous Substance, Pollutant or Waste which is the subject of the action relating to the facility.

(4) The term "Enforcing Officer" shall mean the City of Lodi Director of Public Works, the Water/Wastewater Superintendent of the Public Works Department of the City of Lodi, and such other Person(s) duly designated by the City Council of the City of Lodi.

(5) The term "Environment" shall mean any surface water, ground water, soil water, drinking water supply, soil, land surface, subsurface strata, or ambient air within, under the jurisdiction of, or affected by conditions emanating from the City of Lodi.

(6) The term "Environmental Nuisance" shall mean:

(a) anything affecting the Environment within the City of Lodi which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, or which introduces, or may cause or allow the introduction of, Hazardous Substances or Pollutants into, any navigable lake, river, bay, stream, canal, or basin (specifically including any ground water within the territorial boundaries of the City of Lodi), or any public park, square, street, or highway;

(b) any Release, or threatened Release which causes the incurrence of Abatement Action Costs by the City of Lodi, of any Hazardous Substance, Pollutant or Waste;

(c) any environmental condition which may present an endangerment that may warrant a response to secure adequate protection of public health, welfare or the Environment arising from the past or present handling, storage, treatment, transportation or disposal of a Hazardous Substance, Pollutant or Waste; or

(d) any environmental condition or process declared to be a nuisance by the City Council of the City of Lodi, specifically including, but not limited to, the City of Lodi Ordinance No. 1647, Chapter 8.22 of this Code, Declaration of Nuisance.

(7) The term "Facility" means:

(a) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock or aircraft; or

(b) any site or area where a Hazardous Substance or Pollutant has been deposited, stored, disposed of, or placed, or otherwise has come to be located, but does not include any consumer product in consumer use.

(8) The term "Hazardous Substances" shall include, but shall not be limited to, the following:

(a) Tetrachloroethene (PCE), Trichloroethene (TCE), 1,1,1-Trichloroethane (1,1,1-TCA), 1,1-Dichloroethene (1,1 DCE), cis 1,2-Dichloroethene (c-1,2 DCE), 1,2-Dichloroethane (1,2 DCA), 1,1-Dichloroethane (1,1, DCA), Benzene, Toluene, Ethylbenzene, Xylene, Chromic Acid, Hexavalent Chromium, Bromodichloromethane, Carbon Tetrachloride, Chloroethane (Ethyl Chloride), Chloromethane (Methyl Chloride), Dibromochloromethane, 1,4-Dichlorobenzene, Dichlorodifluoromethane, Dichloromethane, trans-1,2-Dichloroethene, 1,2,3,-Trichloropropane, and Chloroethene (Vinyl Chloride); and

(b) Such other materials as are included within the definitions set forth in:

(i) Section 104(14) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986, Pub.L. 99-499, 100 Stat. 1613, and as further amended by the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996, Pub.L. 104-208, 110 Stat. 3009, 42 U.S.C. §§ 9601-9675 (hereinafter collectively "CERCLA"), 42 U.S.C. § 9601(14);

(ii) Section 1004(5) of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as further amended by the Hazardous and Solid Waste Amendments of 1984, and as further amended by the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996, Pub.L. 104-208, 110 Stat. 3009, 42 U.S.C. §§ 6901 - 6992k (hereinafter collectively "RCRA"), 42 U.S.C. § 6903(5);

- (iii) Section 9001(8) of RCRA, 42 U.S.C. § 6991(8);
- (iv) Section 307(a) of the Federal Water Pollution Control Act, as amended by the federal Clean Water Act, 33 U.S.C. § 1317(a), and its implementing regulations;
- (v) Section 2701(23) of the federal Oil Pollution Act of 1990, 33 U.S.C. § 2701(23);
- (vi) Section 112(6) of the federal Clean Air Act, 42 U.S.C. § 7412(6);
- (vii) Section 25299.22 of the California Health and Safety Code;
- (c) any radioactive material; and
- (d) any other substance, as determined by the City Council of the City of Lodi, which poses or may pose a threat to the human health, welfare, Natural Resources or the Environment if improperly handled, treated, transported or disposed of within the City of Lodi.

(9) The term "Knowingly" imports only a knowledge that the facts exist which bring the act or omission within the provisions of this Chapter. It does not require any knowledge of the unlawfulness of such act or omission, nor does it require any knowledge of any requirement in law that a person affirmatively conduct any inquiry or assessment.

(10) The term "National Contingency Plan" or "NCP" shall mean the National Oil and Hazardous Substances Pollution Contingency Plan promulgated by the U.S. Environmental Protection Agency and codified at 40 C.F.R., Part 300, in accordance with section 105 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986, Pub.L. 99-499, as further amended by the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996, Pub.L. 104-208 ("CERCLA"), 42 U.S.C. § 9605, as the same may be amended or repromulgated from time to time ("NCP"), which plan, as referenced in and for purposes of interpreting this Chapter, shall be interpreted, read and understood, unless the context unambiguously requires otherwise, as the City of Lodi being and acting in every regard as the "Lead Agency".

(11) The term "Natural Resources" shall mean land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, or otherwise controlled or protected by the City of Lodi, or subject to its jurisdiction.

(12) The term "Permitted Activity" shall mean:

- (a) any activity expressly authorized by valid permit issued by a federal, state, county, city or other governmental unit or agency with jurisdiction and authority to issue such permit which allows the very act, omission or process that is defined as, or which created or contributed to, an Environmental Nuisance as defined by this Chapter. A license or permit to introduce Waste, wastewater or other material into a City sewer does not constitute a Permitted Activity with regard to any such material which has come to be located in the Environment after its discharge to a sewer, sewer lateral, or connecting pipe, but prior to its actual arrival at a publicly

owned treatment plant; or

(b) any activity expressly authorized by federal, state, county, city or other governmental statute, regulation, rule or other legislative enactment which allows the very act or process that is defined as, or which created or contributed to, an Environmental Nuisance as defined in this Chapter. Such authorization to introduce Waste, wastewater, or other material into a City sewer does not constitute a Permitted Activity with regard to any such material which has come to be located in the Environment after its discharge to a sewer, sewer lateral, or connecting pipe but prior to its actual arrival at a publicly owned treatment plant.

(13) The term "Person" shall mean an individual, trust, firm, joint stock company, corporation, including a governmental corporation, dissolved corporation to the extent of its available insurance assets, bankruptcy trustee, debtor in possession under the federal bankruptcy laws, partnership, association, consortium, joint venture or commercial entity. " Person" also includes any municipality, county, commission, district, any State, any department or agency thereof or any political subdivision thereof, any interstate body, or the United States, and any of its agencies or instrumentalities to the extent authorized by law, as well as the estate of a deceased individual to the extent of available insurance assets as referred to in California Probate Code section 552.

(14) The term "Pollutant" shall include any element, substance, compound, or mixture, including disease-causing agents, which after Release into the Environment and upon exposure, ingestion, inhalation, or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will or may reasonably be anticipated to cause death, disease, behavioral abnormalities, cancer, genetic mutation, physiologic malfunctions (including malfunctions in reproduction) or physical deformations in such organisms or their offspring.

(15) The term "Release" shall mean any accidental or intentional placing, spilling, discharging, leaking, pumping, pouring, emitting, emptying, injecting, escaping, leaching, dumping, or disposing into the Environment.

(16) The term "Responsible Party" shall mean any Person who is liable pursuant to Section 8.24.040 herein.

(17) The term "Waste" shall include garbage, refuse, sludge from a waste treatment plant, water supply treatment plant or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations and from community activities, as well as sewage and any and all other waste substances, liquid, solid, gaseous or radioactive, associated with human habitation, or of human or animal origin, or from any producing, manufacturing, or processing operation, including waste placed within containers of whatever nature prior to, and for purposes of, disposal.

SECTION 8.24.020 DECLARATION OF PUBLIC NUISANCE

Each and every Environmental Nuisance as defined in Section 8.24.010(6) is a public nuisance.

SECTION 8.24.030 ABATEMENT ACTIONS

(1) Whenever the Enforcing Officer determines that there is or may be an endangerment to the public health, welfare or the Environment arising out of or resulting from an

actual or threatened Environmental Nuisance, the Enforcing Officer may utilize funds available in the Comprehensive Municipal Environmental Response Fund (together with such other or additional funds as may be appropriated for that purpose by the City Council) to prepare to undertake, and to undertake, in compliance with the requirements of this Chapter any Abatement Action which is or may be necessary and proper to secure adequate protection of the public health, welfare and the Environment.

(2) In addition to any other action taken by federal, state, or other local government, when the Enforcing Officer determines that there is or may be an endangerment to the public health, welfare or the Environment arising out of, in whole or in part, an actual or threatened Environmental Nuisance, the Enforcing Officer may either issue an administrative order directing any Responsible Party(ies) to undertake partial or comprehensive Abatement Actions consistent with the National Contingency Plan, as modified, if at all, by the Enforcing Officer pursuant to paragraphs (5) or (6) of this Section 8.024.030, so as to provide adequate protection of the public health, welfare and the Environment, or may request the City Attorney of the City of Lodi immediately to seek appropriate, available judicial remedies, or may, with the advice and consent of the City Attorney, do both.

(3) Any such administrative order issued by the Enforcing Officer pursuant to this Section shall include a statement of the factual and legal grounds upon which the order is issued and may include a schedule for completion of specific actions. Such order shall also specifically advise the Person(s) to whom it is issued of his right to contest the order and request a hearing as provided for in Section 8.24.060 of this Ordinance. Such order shall also conspicuously advise the Person to whom it is directed that failure to request the hearing within the time and in the manner provided for in Section 8.24.060 of this Chapter will result in the order becoming final and binding.

(4) Except to the extent that the City of Lodi has authority pursuant to law to impose additional or more stringent requirements, all Abatement Actions imposed pursuant to this Ordinance involving environmental impacts on waters of the State shall be consistent with any applicable waste discharge requirements or other order issued pursuant to Division 7 (commencing with Section 13000) of the California Water Code, all applicable state policies for water quality control adopted pursuant to Article 3 (commencing with Section 13140) of Chapter 3 of Division 7 of the California Water Code, and all applicable water quality control plans adopted pursuant to Section 13170 of the California Water Code and Article 3 (commencing with Section 13240) of Chapter 4 of Division 7 of the California Water Code, unless, in the opinion of the Enforcing Officer with the advice and consent of the City Attorney, the applicability of those provisions and any orders issued pursuant to them is, in the instance of any Environmental Nuisance which the City of Lodi is actively abating or causing to be abated pursuant to the provisions of this Ordinance, voided, in whole or in part, by operation of California Water Code sections 13002 (a) or (b) or any applicable provision of federal law.

(5) Notwithstanding paragraphs (1) and (4) of this section 8.024.030, the Enforcing Officer may order additional or more stringent requirements for Abatement Action than those that would or might apply under the NCP if the Enforcing Officer determines that such additional or more stringent requirements are appropriate to provide protection against, or abatement of, any present or future endangerment to the public health, welfare, or the Environment, Natural Resources, or as they may be necessary to protect or restore approved land uses consistent with the General Plan within the City of Lodi.

(6) The Enforcing Officer may also order, on his own initiative or upon a timely and appropriately supported application for waiver by a Responsible Party, less stringent requirements

than those that would or might apply under the NCP, if the Enforcing Officer determines that it is in the best interests of the overall public health, welfare and the Environment, after considering the public and private resources that are, or are likely to be, available to respond to an Environmental Nuisance, and after evaluating the following factors:

(a) adequate protection of the public health, welfare and the Environment in light of the endangerments presented and the likely human and financial resources and time available to meaningfully and appropriately respond to those endangerments;

(b) restoring to the fullest extent practicable the free use and enjoyment of land within the City of Lodi, consistent with its general plan, including commercial, industrial and residential use and development;

(c) safety of the City of Lodi's drinking water;

(d) protection of the City of Lodi's tax base; and

(e) preserving and restoring the safety and healthfulness of the Environment so as to preserve and expand the development of employment opportunities within the City of Lodi.

(7) Without conditioning or limiting the obligations imposed in paragraphs (1) through (6) above, the Enforcing Officer is authorized to undertake an Abatement Action with respect to any Environmental Nuisance if such action is necessary in the judgment of the Enforcing Officer to provide adequate response to any condition which may present an imminent and substantial endangerment to the public health, welfare or the Environment within the City of Lodi.

SECTION 8.24.040 LIABILITY

A. - Liability for Abatement Action Costs and Damages.

Notwithstanding any other provision of municipal law --

(1) Any Person who creates, has created, or threatens to create an Environmental Nuisance;

(2) Any Person who has contributed to, is contributing to, or threatens to contribute to an Environmental Nuisance;

(3) Any Person who maintains, has maintained or threatens to maintain an Environmental Nuisance;

(4) Any Person who, at any time during the creation or existence of an Environmental Nuisance, owned or had control over any Facility at or from which an Environmental Nuisance within the City of Lodi has been created, contributed to, or maintained and, who, regardless of actual knowledge of the existence or nature of the Environmental Nuisance condition, failed to abate the Environmental Nuisance;

(5) Any Person who owns or operates any Facility at or from which there has been a Release of a Hazardous Substance or Pollutant;

(6) Any Person who at the time of disposal of any Hazardous Substance or Pollutant owned or operated any Facility at which such Hazardous Substance or Pollutant was disposed of;

(7) Any Person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of Hazardous Substances or Pollutants owned or possessed by such person, by any other party or entity, at any Facility owned or operated by another party or entity and containing such Hazardous Substances or Pollutant;

(8) Any Person who owns or operates, or who owned or operated at or after the time of such Release, any property at which Hazardous Substances or Pollutants came to be located during such Person's period of ownership or operation as a result, in whole or in part, of the previous release of, or the passive migration of previously released, Hazardous Substances or Pollutant, regardless of the source of such original Release, and who, having reasonable grounds to know or suspect the existence of the released Hazardous Substances or Pollutants on the Facility he owns or operates, failed to abate it; and

(9) Any Person (including any past or present generator or past or present transporter) who has contributed to or is contributing to the past or present handling, storage, treatment, transportation or disposal of any Hazardous Substance or Pollutant which presents an Environmental Nuisance or which may present an imminent and substantial endangerment to health or the Environment shall be liable for --

(a) all Abatement Action Costs incurred by the City of Lodi to undertake, or to cause or compel any Responsible Party to undertake, any Abatement Action in compliance with the requirements of this Ordinance, whether those costs are incurred prior to, during or following enactment of this Chapter;

(b) any other necessary costs of response incurred by the City of Lodi not inconsistent with the National Contingency Plan; and

(c) damages for injury to, destruction of, or loss of Natural Resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from the Environmental Nuisance.

B. - Defenses

There shall be no liability under subsection (A) of this section for a Person otherwise liable who can establish by clear and convincing evidence that all of that Person's acts or omissions with regard to the Environmental Nuisance which cause that Person to fall within any of the categories set forth in subsections (A)(1) through (9) of this section 8.024.040 were caused solely by --

(1) an act of God;

(2) an act of war;

(3) an act or omission of a third party other than an employee or agent of the defendant, or than by one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant if the defendant establishes by clear and convincing evidence that: (a) he exercised due care with respect to the acts, events or conditions giving rise to the Environmental Nuisance, taking into consideration the characteristics of such Hazardous

Substance or Pollutant, in light of all relevant facts and circumstance, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or

(4) any combination of the foregoing paragraphs.

C. - Recovery of Abatement Costs.

(1) *Civil Action.* At any time after any Abatement Action Costs have been incurred by the City of Lodi, the City Attorney may commence a civil action in the name of the City of Lodi to recover all such costs from any Responsible Party.

(a) Such an action may be joined with an action for any other relief or damages to which the City of Lodi, acting on its own behalf or as *parens patriae*, may be entitled.

(b) In any civil action brought to recover such costs, civil penalties or mandatory or prohibitory injunctive relief necessary or appropriate to restrain any violations of, or to secure compliance with, any provision of this Chapter in which the City of Lodi has sought recovery of its attorneys fees and in which it prevails, the City of Lodi shall recover all of its reasonable litigation expenses, including attorneys and expert witness fees, incurred by the City of Lodi in the investigation and prosecution of the action.

(c) In any civil action brought to recover such costs, civil penalties or injunctive relief authorized by, or necessary or proper to secure compliance with, this Chapter in which the City of Lodi prevails, the City of Lodi shall be entitled to recover three times its incurred (and to be incurred) Abatement Action costs (including its litigation costs and attorneys and expert witness fees and expenses) and damages, from any Responsible Party who intentionally, willfully or knowingly violated, or failed or refused to comply with any final abatement order issued pursuant to Section 8.024.030 of this Chapter. For purposes of this subparagraph, damages shall include the fees and costs incurred to enforce the provisions of this Chapter or any information request or final order issued pursuant to it, as well as the damages resulting from the failure or refusal to comply with any requirement of this Chapter or any final order (including any order issued under this Chapter which has not been stayed) issued pursuant to this Chapter.

(2) *Declaratory Judgment.* In any action brought by the City of Lodi pursuant to this Section to recover past and future Abatement Action Costs, the court shall enter a declaratory judgment with respect to liability for Abatement Action Costs that will be binding on any subsequent motion(s) or action(s) to recover further Abatement Action Costs. The court shall retain jurisdiction over such matter until six (6) months after an Abatement Action is completed. Upon motion by the City of Lodi no more often than every six (6) months, any further Abatement Action Costs properly incurred by the City of Lodi in responding to the Environmental Nuisance which was the subject of the action shall, following such hearing as the Court may deem proper to establish the recoverability of those costs, be reduced to lump sum judgment against the Responsible Parties found liable in such action.

D. - Standard of Liability.

Unless otherwise expressly indicated, the standard of liability imposed by this Chapter is strict liability, without regard to any element of *mens rea*, fault, negligence or other wrongdoing.

E. - Scope of Liability.

The scope of liability in this Chapter is joint and several for the entire, single indivisible harm to public health, welfare and the Environment resulting from or which may result from the Environmental Nuisance. Any Responsible Party seeking to apportion the harm must demonstrate by clear and convincing evidence that the component of the harm which is sought to be apportioned is scientifically and technologically susceptible to apportionment and that the separate abatement activity proposed is as safe, efficient, reliable and cost-effective in providing the degree of protection of the public health, welfare and the Environment as the abatement activity or activities, if any, proposed by the Enforcing Officer.

F. - Liability for Attorneys Fees.

In a civil action brought pursuant to this Chapter by the City Attorney to recover Abatement Action Costs, attorneys fees may be recovered by the prevailing party. However, the recovery of attorneys fees by the prevailing party is strictly limited to those individual actions or proceedings in which the City of Lodi elects, at the initiation of that individual action or proceeding, to seek recovery of its own attorneys fees.

G. - Obligations or Liability Pursuant to Permitted Activity.

Any obligation to perform Abatement Action in response to, or any recovery for Abatement Action Costs or damages incurred (or to be incurred) as a result of, an Environmental Nuisance resulting from a Permitted Activity shall be pursuant to existing law in lieu of this Chapter. Nothing in this subsection (G) shall affect or modify in any way the obligations or liability of any Person under any other provision of law, including common law, for damages, injury or loss resulting from an Environmental Nuisance.

SECTION 8.24.050 INFORMATION GATHERING & ACCESS

A. - Action Authorized

The Enforcing Officer, the City Attorney or any other Person duly designated by the City Council of the City of Lodi may exercise the authority set forth in this Section if there is a reasonable basis to believe that there is or may be a threat of an Environmental Nuisance within the City of Lodi. The authority of this Section may be exercised only for the purposes of investigating the nature or source of, or contributing sources to, an Environmental Nuisance, or for the purposes of determining the need for Abatement Actions, choosing or taking an Abatement Action under this Chapter, or for the purposes of determining the nature and extent of the assets and financial resources that are or may be available to (or available to provide indemnity or similar benefits to) any potentially Responsible Parties to undertake Abatement Actions which are or may be required pursuant to this Chapter or to reimburse the Comprehensive Municipal Environmental Response Fund for any Abatement Action Costs incurred or to be incurred by the City of Lodi pursuant to this Chapter.

B. - Information Gathering

(1) *Authority to Compel Production of Documents & Information.* The Enforcing Officer or any other Persons authorized to act pursuant to this Section may require, upon twenty-eight (28) day notice or such shorter notice as may be reasonable, any Person who has or may have

information relevant to any Environmental Nuisance within the City of Lodi or affecting the City of Lodi, regardless of where such information or documents are or may be found, to produce to, and permit copying of any books, records and other non-privileged documents by, the Enforcing Officer or his designee that contain, relate to, or may reasonably lead to the discovery of, any of the following information:

- (a) The nature, characteristics, origin or extent of any Environmental Nuisance, or of any Hazardous Substance or Pollutant which is or may be contributing to such an Environmental Nuisance;
- (b) The nature, characteristics, origin or extent of any existing or threatened Release of Hazardous Substances, Pollutants or Wastes;
- (c) The identification, nature or quantity of materials which may be or may have been related by source, composition, origin, destination or use to the Environmental Nuisance or an existing or threatened Release of Hazardous Substances, Pollutants or Wastes;
- (d) The identification, location of any and all assets (including any guarantee, indemnity or insurance agreements, contracts or policies of any kind), or information pertaining to the financial condition of any Person who is, may have been, or may be a Responsible Party as defined by this Chapter;
- (e) Information relating to the ability of any Person who is, may have been, or may be a Responsible Party to pay for or perform an Abatement Action or to reimburse the City of Lodi for Abatement Action Costs it has incurred or may incur, including information regarding the assets, ability, liability and responsibility of any guarantor, indemnitor, or insurer of (or providing any benefits to) any Person who is or may be a Responsible Party, to perform or pay for the performance of any Abatement Actions, or to pay, indemnify, or reimburse for the costs of any potentially Responsible Party's performance of an Abatement Action or payment of Abatement Action Costs incurred or to be incurred by the City of Lodi.

(2) *Authority to Compel Testimony.* The Enforcing Officer or any other Persons authorized to act pursuant to this Section may require, upon reasonable notice, any Person who has or may have information relevant to any Environmental Nuisance within the City of Lodi or affecting the City of Lodi, to appear and give non-privileged testimony under oath before the Enforcing Officer or his designee concerning such Environmental Nuisance, as well as concerning any documents or information which are properly the subject of a request pursuant to section 8.24.050.B(1) above. Testimony may be compelled either before or after documents and information is produced as provided hereinabove.

(3) *Availability to Public.* All documents or other information obtained by the Enforcing Officer pursuant to this Section shall be available to the public, except that upon a showing satisfactory to the Enforcing Officer, such information and documentation shall be maintained in the manner described in Section 8.24.050.B(5).

(4) *Assertions of Privilege or Other Legal Basis for Failure to Produce.*

- (a) If any Person from whom information or documents are requested pursuant

to this Section fails to furnish such information or to produce such documents based on a claim of privilege or for any other reason, the Person must provide for each document withheld a concise written statement setting forth all factual bases supporting the claim of privilege and the asserted legal authority upon which the failure or refusal to produce is based. The written statement must, at a minimum, include the following as to each document to be withheld:

- (i) the identity of the author thereof, the parties thereto and any other Person who helped in its preparation;
- (ii) the title or other identifying data;
- (iii) the date of the document or, if no date appears thereon, the approximate date;
- (iv) a summary of the nature (e.g. letter) and content of the document sufficient to identify it;
- (v) the name and location of each Person having or last having possession, care, custody or control of the original and of each copy thereof and the names of all Persons to whom the document has been disclosed; and
- (vi) if such document was, but is no longer in the possession or control of the Person from whom the document is requested, what disposition was made of it, including but not limited to the name and address of the Person who disposed of the document as well as the date, time, place and mode or method of disposal.

(5) *Assertions of Confidentiality Arising From Trade Secret.*

- (a) Upon a showing satisfactory to the Enforcing Officer by any Person that records, reports, documents, or other information to which the Enforcing Officer or any officer, employee or representative of the City of Lodi has access under this Section, if made public would divulge information entitled to protection under 18 U.S.C. § 1905, under Cal. Evidence Code § 1060, or under Cal. Health & Safety Code § 25538, such information and documentation shall be considered confidential in accordance with the purposes of those sections and the properly substantiated trade secret information shall be segregated from information which shall be made available to the public upon request in accordance with the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code). In the event the Enforcing Officer determines that certain records, reports, documents, or other information are not entitled to confidential treatment as trade secrets pursuant to this Section, the Enforcing Officer shall file with the City Clerk and serve on the Persons making the assertion of confidentiality a written order setting forth his determination.
- (b) No Person required to provide information or documents under this Section may claim that the information is entitled to protection under this subsection

unless such Person clearly demonstrates each of the following:

- (i) Such Person has not disclosed the information to any other Person, other than an officer or employee of the United States, the State of California or local government, or an employee of such Person who is bound by a confidentiality agreement, and such Person has taken reasonable measures to protect the confidentiality of such information and intends to continue such measures;
 - (ii) The information is not required to be disclosed, or otherwise made available, to the public under any other Federal, State or local law;
 - (iii) Disclosure of the information is likely to cause substantial harm to the competitive position of such Person; and
 - (iv) If specific chemical identity is sought to be protected, that such chemical identity is not readily discoverable through reverse engineering.
- (c) Except as otherwise specified in Section 8.24.050.B, neither the Enforcing Officer nor any officer, employee or representative of the City of Lodi shall disclose any properly substantiated trade secret which is so designated.
- (d) The Enforcing Officer, as well as any officer, employee or representative of the City of Lodi, may disclose trade secrets received pursuant to this Section to authorized officers, employees or representatives of other governmental agencies only in connection with the official duties of that officer, employee or representative pursuant to any law for the protection of health and safety.
- (e) If in the course of any administrative or judicial proceeding commenced pursuant to this Chapter the Enforcing Officer with the advice and consent of the City Attorney determines that trade secrets received pursuant to this Section should be disclosed in order to facilitate appropriate protection of public health, welfare or the Environment or to secure timely performance of an Abatement Action, the Enforcing Officer shall notify each affected business that disclosure under this paragraph (4)(e) is being proposed and shall describe the nature of the proposed disclosure and the proposed recipients. Unless exigent circumstances render such a delay in disclosure impracticable, each such affected business shall be afforded a period of five (5) business days to object to the proposed disclosure. Trade secrets received pursuant to this Section may be disclosed under this paragraph (4)(e) only if, after consideration of any timely objections submitted by any such affected business, the Enforcing Officer with the advice and consent of the City Attorney determines in writing that, for reasons directly associated with the performance of the Abatement Action, that the proposed disclosure is necessary to protect the public interest in a safe and healthful Environment, and the Enforcing Officer with the advice and consent of the City Attorney further determines in writing that disclosure of the trade secret information is necessary and appropriate to the timely and competent performance of the selected Abatement Action. The Enforcing Officer with

the advice and consent of the City Attorney may condition disclosure of trade secrets received pursuant to this Section upon the making of, or seeking from the court, such protective arrangements and commitments as the Enforcing Officer or the Court finds to be warranted.

- (f) The Enforcing Officer, as well as any officer, employee or representative of the City of Lodi, shall disclose trade secrets received pursuant to this Section to the public, or to one or more parties of record to any administrative or judicial proceeding commenced pursuant to this Chapter, if compelled to do so by lawful process of any administrative agency or court of competent jurisdiction.
- (g) Any officer or employee or former officer or employee of the City of Lodi or any other governmental agency who, because of employment or position, has possession of, or has access to, information designated as a trade secret pursuant to this subsection, shall not knowingly and willfully disclose the information in any manner to any person not authorized to receive the information pursuant to this subsection. Any Person who violates the provisions of this paragraph, and who knows that disclosure of this information to the general public is prohibited by this subsection, shall, upon conviction, be punished by imprisonment in the county jail for not more than six (6) months or by a fine of not more than five hundred dollars (\$500.00), or by both such fine and imprisonment.

(6) *Right of Entry.* Whenever necessary for the purpose of investigating or enforcing the provisions of this Chapter, or whenever the Enforcing Officer has reasonable cause to believe that there exists in any structure or upon any land or any premises, any Environmental Nuisance or a violation of this Chapter, the Enforcing Officer may enter such structure or land or premises at all reasonable times to inspect the same, or to perform any duty imposed upon the Enforcing Officer by law; provided, that if such structure or land or premises be occupied, the Enforcing Officer shall first present proper credentials and request entry, and further provided, that if such structure, land, or premises be occupied by a firm, corporation or other entity, the Enforcing Officer shall first make a reasonable attempt to contact a responsible Person from such firm or corporation or other entity and request entry, except in emergency circumstances. If such entry is refused, the Enforcing Officer seeking entry shall have recourse to each and every remedy provided by law to secure entry for the purposes described above.

(7) *Discretionary Inspections of Enforcing Officer.* All inspections specified herein shall be at the sole discretion of the Enforcing Officer and nothing in this Section shall be construed as requiring the Enforcing Officer to conduct any such inspection nor shall any actual inspection made imply a duty to conduct any other inspection. Furthermore, nothing in the Section shall be construed to hold the Enforcing Officer, or any officer, employee or representative of the Enforcing Officer, responsible for any damage to Persons or property by reason of making an inadequate or negligent inspection or by reason of any failure to make an inspection or reinspection.

C. - Enforcing Officer's Authority to Direct Inspections By Others.

The Enforcing Officer is expressly authorized, at his sole discretion, to hire, retain or otherwise direct appropriately qualified Persons reasonably necessary to assist the Enforcing Officer in the exercise of the authority granted in this Section.

D. - Monitoring or Testing.

(1) Upon receipt of any information that an Environmental Nuisance may present an endangerment to public health, welfare or the Environment, the Enforcing Officer may order any Responsible Party to conduct such monitoring, testing, analysis, and reporting with respect to such Environmental Nuisance as the Enforcing Officer deems reasonable to ascertain the nature and extent of any resulting potential endangerment.

(2) An order under paragraph (1) of this subsection shall require the Person to whom the order is issued to submit to the Enforcing Officer within thirty (30) days from the issuance of such order a proposal for carrying out the required monitoring, testing, analysis, and reporting. The Enforcing Officer may, after providing such Person with an opportunity to confer with the Enforcing Officer respecting such proposal, require such Person to carry out such monitoring, testing, analysis, and reporting in accordance with such proposal, and may impose such modifications to the proposal as the Enforcing Officer deems reasonable to fully ascertain the nature and extent of the hazard; and

(3) If the Enforcing Officer determines that no Responsible Party is able to conduct monitoring, testing, analysis or reporting satisfactory to the Enforcing Officer or if the Enforcing Officer deems that any such action carried out by the Responsible Party to be unsatisfactory, the Enforcing Officer may conduct monitoring, testing or analysis (or any combination thereof) which the Enforcing Officer deems reasonable to ascertain the nature and extent of the hazard associated with the Environmental Nuisance concerned. The Enforcing Officer may further require, by order, that the Responsible Party referred to in paragraphs (1) and (2) above reimburse the Enforcing Officer for the costs of such activity undertaken pursuant to this paragraph (3), or for the costs of reviewing, commenting on, and revising a Responsible Party's plans and reports submitted pursuant to this subsection (D) or overseeing and monitoring any Responsible Party's performance of the monitoring and testing activities required pursuant to this subsection (D).

E. - Prohibition Against Pre-Enforcement Review

No Person may seek judicial or administrative review of any information request or of any order issued pursuant to this section 8.24.050 unless and until the Enforcing Officer seeks to compel compliance with such information request or order pursuant to administrative process or until the City Attorney commences a civil or criminal action to compel compliance with this section or to impose penalties pursuant to Section 8.24.080 of this Chapter for failure to comply with such information request or such order.

F. - Mandatory Compliance.

Without valid legal privilege to do so, no Person shall fail or refuse to comply with any information request issued pursuant to this section. Nor shall any Person fail or refuse to comply with any order issued pursuant to this section or obstruct, impede, or otherwise interfere with compliance with any order issued, or any exercise of any information gathering, inspection, monitoring, testing or access authority provided in this Section. Nor shall any Person conspire to obstruct, impede or otherwise interfere with the exercise of any information gathering, inspection, monitoring, testing or access authority provided in this Section.

G. - Other Authority

Nothing in this Section shall preclude the Enforcing Officer or the City of Lodi from securing access or obtaining information and documents in any other lawful manner.

SECTION 8.24.060 ADMINISTRATIVE PROCEDURES

A. - Finality of Abatement and Monitoring Orders

(1) Any order issued pursuant to Section 8.24.030 or 8.24.050 shall become a final, binding order upon issuance and service, unless:

- (a) a timely objection to the order issued pursuant to Section 8.24.030 or 8.24.050 by the Enforcing Officer is filed and served pursuant to this Chapter;
 - (b) a timely request for review of the order issued pursuant to Section 8.24.030 or 8.24.050 by the Hearing Officer is filed and served pursuant to this Chapter;
 - (c) a timely writ of mandate in the appropriate judicial forum pursuant to California Code of Civil Procedure § 1094.6 is properly filed and served following affirmation of the order, issued pursuant to Section 8.24.030 or 8.24.050, by the City Council of the City of Lodi in whole or in part after timely application for review to the City Council.
- (2) The filing of an objection or request for review, when made within the time specified, shall constitute a stay against compliance with the order. However, nothing in this Section shall preclude or affect the authority of the Enforcing Officer to implement measures deemed necessary to protect the public health, welfare or the Environment from an Environmental Nuisance or to recover the costs of any such measures, or undertake appropriate action under applicable federal, state or local law.

B. - Review of Abatement and Monitoring Orders.

(1) *Hearing Officer.* The City Council of the City of Lodi shall appoint one or more Hearing Officers who are authorized to hear all objections to orders issued by the Enforcing Officer pursuant to Section 8.24.030 or 8.24.050 and issue an order following review of and, if appropriate, conduct of a hearing on, the objections.

(2) *Objection And Response Thereto.*

- (a) *Objection.* Any Person who has been named in an order issued by the Enforcing Officer pursuant to Sections 8.24.030 or 8.24.050 of this Chapter may file an objection to such order. An objection must be in writing and filed with the City Clerk of the City of Lodi and served on the Enforcing Officer and the City Attorney of the City of Lodi on or before the twentieth (20th) day following service of the Enforcing Officer's order. Any objection must state both the legal and factual bases in support thereof, and must include at a minimum, the requested modification(s), if any, of the order together with a

summary of the issues, facts, and legal authorities to be raised at the hearing. The time requirement for filing any objection shall be deemed jurisdictional and may not be waived. Upon timely receipt of an objection which complies with the requirements of this section, the City Clerk shall notify the Hearing Officer appointed pursuant to subsection (B)(1) of this section of the filing of a compliant objection and shall, as directed by the Hearing Officer, maintain and transmit a copy of the file.

- (b) *Response Thereto.* Not less than seven (7) days prior to the hearing, the Enforcing Officer may file with the City Clerk of the City of Lodi and serve on all Persons named in the order which is the subject of the objection, a written statement in response to the objection.

(3) *Hearing On Objection.*

- (a) Within ten (10) days following the timely filing of an objection, the Hearing Officer shall hold a pre-hearing management conference for the purpose of:
 - (i) expediting the disposition of the hearing;
 - (ii) establishing early and continuing control so the due course of bringing the matter to hearing will not be protracted because of lack of management or lack of diligence by any of the parties or their counsel;
 - (iii) discouraging wasteful pre-hearing activities;
 - (iv) improving the quality of the hearing through more thorough and focused preparation.
- (b) Absent exceptional circumstances, the Hearing Officer shall schedule all necessary and appropriate discovery so as to permit the establishment of a hearing date at the earliest appropriate date, but in no event more than forty-five (45) days from filing date of the objection.
- (c) The Enforcing Officer shall have the initial burden of producing *prima facie* evidence of the facts supporting the findings set forth in the order. Upon such a showing, the Person objecting to the order has the burden of proving that the Enforcing Officer committed a prejudicial abuse of discretion in issuing the order. An abuse of discretion is shown only where the Enforcing Officer failed to proceed in the manner required by law or where the issuance of the order was arbitrary, capricious, contrary to law, or without any reasonable basis.
- (d) The Hearing Officer shall issue and file a final written order which shall set forth the findings of fact and conclusions of law upon which it is based on or before the tenth (10th) day following the hearing on the objection.

(4) *Hearing Procedures.*

- (a) Oral evidence shall be taken only upon oath or affirmation.

- (b) Subject to the Hearing Officer's discretion to control and direct the proceedings before him, each party may call and examine witnesses on relevant matters, introduce relevant and probative exhibits, cross examine opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examination, impeach any witness regardless of which party first called him to testify, and rebut adverse evidence.
- (c) The hearing need not be conducted according to technical rules relating to evidence and witnesses. Subject to the Hearing Officer's reasonable discretion to control the proceedings before him, any relevant evidence shall be admitted if it is the sort of evidence on which responsible Persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in judicial civil actions. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a necessary finding unless it would be admissible over objection in judicial civil actions. The rules of privilege shall be effective to the extent that they are otherwise required by statute to be recognized at the hearing, and irrelevant and unduly repetitious evidence shall be excluded.
- (d) The Hearing Officer shall direct a duly licensed court reporter to prepare a record of the hearing.
- (e) The Hearing Officer shall have authority to control the course of the proceedings and the conduct of argument and shall rule on the admission of evidence. The Hearing Officer shall further have the authority, *sua sponte* or at the request of any party to the hearing, to issue subpoenas to compel the attendance and testimony of witnesses and the production of documents and information at any proceeding before the Hearing Officer or at any deposition authorized by him to be taken in preparation for hearing on any matter properly before him. Any contempt of the Hearing Officer shall be punished as contempt of the City Council of the City of Lodi to the full extent authorized by law.
- (f) Any hearing under this Section may be continued for a reasonable time only upon a showing of exceptional circumstances.

(5) *Review of Hearing Officer's Order.* Any Responsible Party aggrieved by any order issued by the Hearing Officer under this Section, may request a hearing before the City Council of the City of Lodi to review such order. Any request for a hearing shall be filed in writing with the City Clerk of the City of Lodi and shall include the address of the Person making the request to which all notices shall be sent. The objection shall specifically state whether the party requests an opportunity to present oral argument to the City Council and an estimate of the time necessary to do so.

(6) *Written Request for Review.* A written request for review must be filed with the City Clerk of the City of Lodi and served on the City Attorney for the City of Lodi within ten (10) days from the date of service of the Hearing Officer's order. The request shall include each of the

following:

- (a) the date of service of the applicable order to the Responsible Party;
- (b) the location of the structure, land or premises which is the subject of the order;
- (c) the Hazardous Substance(s), Pollutant(s) or Waste(s) which was Released or may be Released;
- (d) the action ordered to be taken;
- (e) the reason for requesting a hearing; and
- (f) the Responsible Party's address (and the name and address of legal counsel, if any) to which all notices shall be sent.

(7) *Determination on Review of Hearing Officer's Order.* If any party has requested oral argument, the City Council of the City of Lodi shall set the time and place of hearing and notify all parties at least twenty-one (21) days prior to the hearing unless all objecting parties agree to a shorter time. The notice to the Responsible Party shall be substantially in the following form but may include additional information:

You are hereby notified that the requested hearing on the record before the Hearing Officer will be held before the City Council at (here insert place of hearing) on the _____ day of _____, 19____, at the hour of _____, on the report of the Hearing Officer dated and which was served on you on _____. You have the right to be represented by an attorney at your own expense. You are not entitled to the appointment of an attorney to represent you at public expense. You are entitled to represent yourself without legal counsel.

(8) *Statement of Issues and Positions.*

- (a) Not later than fifteen (15) days prior to the hearing date set for the review by the City Council of the City of Lodi, the party who requested the hearing shall file with the City Clerk for the City of Lodi and serve upon the Hearing Officer and the City Attorney a brief written statement identifying:
 - (i) the requested modification(s) of the order and the Hearing Officer's decision; and
 - (ii) a summary of the issues, facts, and legal authorities to be raised at the hearing.
- (b) Not less than seven (7) days prior to the hearing, the Enforcing Officer may submit a brief written statement in response to the City Clerk and serve it upon the party requesting review.

(9) *Conduct on Review of Decision.* The hearing before the City Council of the City of Lodi shall be upon the record of proceedings and evidence presented to the Hearing Officer. No new evidence, not previously presented to the Hearing Officer, may be introduced or argued except

upon written notice filed three (3) days before the hearing demonstrating that the new evidence was: (a) not reasonably available or known of at the time of hearing before the Hearing Officer, or (b) substantial justice or fundamental fairness requires consideration of such evidence and good cause is shown why such evidence was not introduced at the hearing before the Hearing Officer.

(10) *Decision.* Within fifteen (15) days after the hearing is concluded, the City Council of the City of Lodi shall prepare a written decision which shall contain rulings on the objections to the order and the Hearing Officer's decision. Copies of the Council decision shall be delivered as required by subsection (C) of this Section 8.024.060. The City of Lodi adopts California Civil Procedure Code Section 1094.6 as the applicable rule of procedure for the judicial review of any final decision issued pursuant to this section.

C. - Notices.

All notices required by this Section shall be sent by certified mail, postage prepaid, to the applicant at the address given for purposes of notice on the application or delivered personally.

SECTION 8.24.070 ESTABLISHMENT AND PURPOSE OF FUND

A. - Creation and Purpose of the Fund.

The City Council of the City of Lodi hereby creates the "Comprehensive Municipal Environmental Response Fund" into which all amounts, net of expenses, fees and costs incurred pursuant to its enforcement efforts paid for from funds of the City of Lodi other than the fund created by this subsection, received by the City of Lodi from, or on behalf of, potentially Responsible Parties shall be deposited. The City Council of the City of Lodi may create such discrete accounts within the Comprehensive Municipal Environmental Response Fund as may be necessary or appropriate to maintain financial records relating to specific Environmental Nuisances. The City Council of the City of Lodi hereby directs the formation, within the Comprehensive Municipal Environmental Response Fund, of a restricted account to be known as the "Lodi Area of Contamination Comprehensive Environmental Nuisance Abatement Fund", which shall separately account for all amounts recovered relating to the soil and groundwater contamination generally referred to as the Lodi Area of Contamination and directs that all amounts recovered which relate to the Lodi Area of Contamination be deposited therein.

B. - Authorized Expenditures.

The funds available, by account, in the Comprehensive Municipal Environmental Response Fund may be used for the purposes specified in this subsection:

- (1) To pay all necessary and appropriate cost of Abatement of an Environmental Nuisance incurred by the City of Lodi or any designated representative of the City of Lodi;
- (2) To pay for Site characterization of any place that is or may be affected by an Environmental Nuisance;
- (3) To pay for all investigative work which is or may be necessary and appropriate relating to an Environmental Nuisance;
- (4) To pay for all costs, including but not limited to attorneys' fees and consultant fees,

of the immediate commencement and diligent prosecution of appropriate enforcement actions against potentially Responsible Parties, utilizing, as appropriate, the full range of the City of Lodi's remedial and regulatory injunctive and cost recovery authority under federal, state and municipal law, to compel the complete, timely, competent and cost-effective performance of all response actions necessary to develop and implement a NCP-compliant Remedial Action Plan ("RAP") that fully characterizes the lateral and vertical extent of the Hazardous Substances at and emanating from the Site and which results in a NCP-compliant RAP which fully and appropriately abates any endangerment to public health, welfare or the Environment resulting from the Hazardous Substances or Pollutants at and emanating from the Site.

(5) To reimburse to the California Environmental Protection Agency, Department of Toxic Substances Control ("DTSC") or any other applicable regulatory agency, the properly billed past response costs incurred by DTSC or any other applicable regulatory agency arising from or related to any Environmental Nuisance, which costs the City of Lodi has agreed to pay or reimburse.

SECTION 8.24.080 ENFORCEMENT

A. - Mandatory Compliance.

Without valid legal privilege to do so, no Person shall violate any provision of this Chapter or refuse to comply with, or otherwise impair, interfere with, or impede any Person's compliance with, any Information Request or any order issued pursuant to this Chapter. Nor shall any Person conspire to violate any provision of this Chapter or refuse to comply with any information request or order issued pursuant to this Chapter.

B. - Injunctions in Civil Actions.

(1) Any existing or threatened violation of this Chapter, specifically including any failure to comply with any order issued pursuant to Section 8.24.030 herein, or of any final order may be enjoined and compliance may be directed by a temporary restraining order, preliminary injunction or partial or complete mandatory or prohibitory permanent injunction, or other appropriate order of the court in an action brought in the name of the People of the State of California by the City Attorney.

(2) In any action brought by the City Attorney, either on his own instance or upon request of the Enforcing Officer, to enforce compliance with any information request or order issued pursuant to Section 8.24.050 of this Chapter, the Court shall take the following actions:

- (a) In the case of interference with entry or inspection, the court shall enjoin such interference or direct compliance with orders to prohibit interference with entry or inspection unless under the circumstances of the case the demand for entry or inspection is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law.
- (b) In the case of information (including testimony) or document requests or orders, the court shall enjoin interference with such information or document requests or orders or direct immediate compliance with the requests or orders to provide such information (including testimony) or documents unless under the circumstances of the case the court finds that the party to whom the request or order was directed has demonstrated by clear and

convincing evidence that the request or demand for information (including testimony) or documents is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law.

(3) In any civil action brought by the City Attorney pursuant to this Section in which a temporary restraining order, preliminary injunction, or partial or complete mandatory or prohibitory permanent injunction is sought, the City of Lodi shall be entitled to injunctive relief without allegation of, or the necessity of proving, that irreparable damage will occur if the injunctive relief is not ordered or that the remedy at law is inadequate.

(4) Any action brought pursuant to this Section may be brought by the City Attorney in the name of the People of the State of California independent of, or combined with, any action for civil penalties or any other relief provided by this Chapter, other municipal law, or by applicable federal or state law.

C. - Civil Penalties.

(1) *Imposition of Civil Penalties.* Any Person who violates any requirement of this Chapter or any final order issued pursuant to this Chapter, or who fails or refuses to comply with an information request issued pursuant to this Chapter, is liable to the City of Lodi for the following civil penalty to be credited to and deposited in the Comprehensive Municipal Environmental Response Fund:

- (a) Except as provided in subparagraph (1)(b) below, not more than five thousand dollars (\$5,000.00), but not less than one thousand dollars (\$1,000.00) per violation per each calendar day of violation.
- (b) of not more than ten thousand dollars (\$10,000.00), but not less than one thousand dollars (\$1,000.00) per each intentional, knowing or willful violation per each calendar day of such violation.
- (c) Liability under this subsection may be imposed in a civil action or liability may be imposed administratively pursuant to this Section. Any such action may be joined with an action for any other available remedy, including injunctive relief, as provided under this Section.

(2) *Determination of Amount of Civil Penalties.* In determining the amount of any civil penalty under this Section the court or other adjudicatory body shall, at a minimum, impose a penalty amount which eliminates all economic benefit which has accrued to and which is accruing to the violator by reason of noncompliance and which compensates the public for the harm and damage done to the Environment as a result of the violator's noncompliance. Impossibility of substantial compliance, or the impossibility of quantifying the harm to the Environment, does not bar the assessment of such a penalty. In addition, in determining the penalty, the court or other adjudicatory body shall consider the violator's degree of recalcitrance, the absence of good faith cooperation with the City of Lodi and any other governmental entities responding to the Environmental Nuisance, the violator's defiance of or indifference to requirements of the law, and any unusual or extraordinary burdens imposed on the public welfare or the public fisc as a result of the violation as factors requiring enhancement of the minimum penalty amount; and may mitigate the total amount calculated under the first sentence of this paragraph (2) to reflect any part of the noncompliance caused by the existence of extenuating circumstances that were wholly beyond the violator's control.

D. - Criminal Penalties & Fines.

(1) Except as provided in paragraph (2) of this subsection 8.24.080(D), the violation of any provision of this Chapter or any final order issued pursuant to this Chapter shall be a misdemeanor punishable by a fine of not more than five hundred dollars (\$500.00), or imprisonment for not more than six (6) months, or both for each violation. Each calendar day during which a violation occurs or continues shall constitute a separate violation.

(2) The intentional, knowing or willful violation of any provision of this Chapter or any final order issued pursuant to this Chapter, shall be a misdemeanor punishable by a fine of not more than one thousand dollars (\$1,000.00), or imprisonment for not more than one year, or both for each violation. Each calendar day during which such a violation occurs or continues shall constitute a separate violation;

(3) The violation of any provision of this Chapter or any final order issued pursuant to this Chapter by any Person who has previously been convicted of one or more violations of this Chapter or any final order issued pursuant to this Chapter shall be a misdemeanor punishable by a fine of not more than one thousand dollars (\$1,000.00), or imprisonment for not more than one year, or both for each violation. Each calendar day during which such a violation occurs or continues shall constitute a separate violation.

E. - Maximum Penalty.

If the maximum amount of any civil or criminal penalty imposed by this Section is determined to be in excess of the maximum amount authorized by law, the amount shall be reduced to the maximum amount permitted by law.

F. - Relationship to Other Liability and Other Remedies.

(1) Nothing in this subsection in any way limits, conditions or affects the liability of any Responsible Party to the City of Lodi for Abatement Action Costs or for any other legal or equitable remedy.

(2) In any criminal action brought pursuant to this Section in which the defendant is convicted of a violation of this Chapter, the court shall, upon motion of the City Attorney and following such hearing before the court sitting without a jury as the court may deem necessary, issue appropriate mandatory or prohibitory injunctive relief as may be necessary to restrain further violations of this Chapter, to remedy the existing endangerments to public health or the environment which may be presented by past violations of this Chapter, or to secure compliance with the requirements of this Chapter.

G. - Remedies not Exclusive.

Remedies under this Section are in addition to and do not supersede or limit any and all other remedies, whether civil, criminal or administrative. Nothing in this Section shall affect or modify in any way the obligations or liabilities of any Person under any other provision of state, federal or local law, including common law, for damages, injury, loss, or for liability for nuisance abatement and nuisance abatement costs incurred by the City of Lodi which results from an Environmental Nuisance in the City of Lodi.

H. - Penalties for Certain Knowing Violations

In addition to the penalties provided for in Section 8.24.080(A) through (G), any Person who Knowingly fails to provide the notice required by 42 U.S.C. § 9603(a) or (c), or by California Health & Safety Code § 25359.4, or any generator subject to Cal. Health & Safety Code § 25200.3 who Knowingly fails to comply with the requirements thereof, as the foregoing requirements relate to Hazardous Substances, Pollutant(s) or Waste(s) which present, may present, contribute or may contribute to an Environmental Nuisance as defined in paragraph 8.24.010(6), shall not be entitled to any limitation of liability or to any defenses to liability set out in section 8.24.040(b); provided, however, that notification under this subsection is not required for any facility which would be reportable solely as a result of any stoppage in transit which is temporary, incidental to the transportation movement, or at the ordinary operating convenience of a common or contract carrier, and such stoppage shall be considered as a continuity of movement and not as the storage of a Hazardous Substance, Pollutant or Waste.

SECTION 8.24.090 MISCELLANEOUS PROVISIONS

A. - Severability.

If any Section, subsection, paragraph, sentence, clause or phrase of this Chapter is for any reason held to be unconstitutional or otherwise contrary to law, such decision shall not affect the remaining portions of this Chapter.

B. -Direct Action Against Indemnitors of Certain Potentially Responsible Parties.

(1) In any case where a potentially Responsible Party is in bankruptcy, reorganization, or arrangement pursuant to the Federal Bankruptcy Code, or if with reasonable diligence, jurisdiction cannot be obtained over a potentially Responsible Party who is likely, as judged at the time of the commencement of the action, to be solvent to meet all of the relief demanded in the City of Lodi's complaint or administrative order at the time of judgment or at the time the administrative order becomes final and binding, the City of Lodi may commence a civil or administrative action directly against any person that is or may be guarantor, indemnitor or insurer ("Indemnitor") of the potentially Responsible Party on any claim arising under this Chapter.

(2) In the case of any action, either administrative or civil, brought pursuant to this subsection against an Indemnitor, such Indemnitor shall be entitled to invoke all rights and defenses which:

- (a) would have been available to the potentially Responsible Party in an action brought against the potentially Responsible Party by the City of Lodi pursuant to this Chapter; and
- (b) which would have been available to the Indemnitor if an action had been brought against the Indemnitor by the potentially Responsible Party.

(3) Unless, at the time of commencement of a civil or administrative action under this subsection:

- (a) there is a pending civil action to find and determine the obligations, if any, existing between any Indemnitor and a potentially Responsible Party whose liability under this Chapter is the subject of a claim against an Indemnitor brought pursuant to this subsection; and

(b) such pending civil action is being diligently prosecuted,

the Indemnitor shall deny or otherwise contest its liability only in an action commenced under this subsection. In all other cases, the Indemnitor may deny or otherwise contest its liability in an action under this subsection or by any independent action that is diligently commenced and prosecuted. Any claims or defenses to liability not brought or maintained in compliance with this subparagraph (3) shall be barred.

(4) In any civil action brought pursuant to this Section against an Indemnitor, all issues that are triable to the court sitting without a jury shall be heard and resolved by the court prior to a hearing on the issues, if any, that are triable to a jury as a matter of right and in which a jury has been timely and properly demanded. If there are claims, demands or defenses in any such action that are triable to a jury as a matter of right and in which a jury has been timely and properly demanded, notwithstanding that recovery on such claims shall continue to be limited to only those amounts recoverable from the Indemnitor pursuant to paragraph (4) of this subsection and any judgment rendered on such claims shall be directly enforceable only against the Indemnitor, those claims shall precede next in order following resolution of all issues that are triable to the court sitting without a jury and shall, in all regards and proceedings before the jury, be presented as though the case had been brought solely against the Responsible Party.

(5) The total liability of any Indemnitor in an action brought pursuant to this subsection shall be limited to the aggregate remaining amount of the monetary limits of the indemnity agreement, policy of insurance, guarantee, surety bond, letter of credit or similar instrument obtained from the Indemnitor by the potentially Responsible Party, together with any other amounts for which the Indemnitor is liable to the Responsible Party by operation of law resulting, in whole or part, from a breach of the duty to defend against, or the unreasonable failure or refusal to settle, any claim brought against the Responsible Party by the City of Lodi.

(6) The judgment entered in any action brought pursuant to this subsection shall be enforceable directly against the Indemnitor(s).

(7) Nothing in this Section shall be construed to limit any other state or federal statutory, contractual, or common law liability of an Indemnitor, including but not limited to the liability of such Indemnitor for bad faith either in negotiating or in failing to negotiate the settlement of any claim.

C. - Relationship to Other Authority

Nothing in this Chapter shall be construed or interpreted to limit, restrict or preempt the authority of the City of Lodi or of the City Attorney for the City of Lodi pursuant to any other local, state or federal laws, specifically including the authority to assert claims to abate a public nuisance pursuant to California Code of Civil Procedure Section 731.

D. - Contribution

(1) *Settlement.* Any Person who has resolved its liability to the City of Lodi in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially Responsible Parties unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

(2) *Persons Not A Party To Settlement.*

- (a) If the City of Lodi has obtained less than complete relief from a Person who has resolved its liability to the City of Lodi in an administrative or judicially approved settlement, the City of Lodi may bring an action against any Person who has not resolved its liability.
- (b) A Person who has resolved its liability to the City of Lodi for some or all of an Abatement Action or for some or all of Abatement Action Costs in an administrative or judicially approved settlement may seek contribution pursuant to the general laws of the State of California from any Person who is not a party to a settlement referred to in subparagraph (2)(a) of this Section 8.024.090(D).

(c) In any action under this subsection, the rights of any Person who has resolved its liability to the City of Lodi shall be subordinate to the rights of the City of Lodi. Any contribution action brought under this subsection shall be governed by the laws of the State of California.

Section 2 - No Mandatory Duty of Care. This ordinance is not intended to and shall not be construed or given effect in a manner which imposes upon the City, or any officer or employee thereof, a mandatory duty of care towards persons or property within the City or outside of the City so as to provide a basis of civil liability for damages, except as otherwise imposed by law.

Section 3 - Severability. If any provision of this ordinance or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the ordinance which can be given effect without the invalid provision or application. To this end, the provisions of this ordinance are severable. The City Council hereby declares that it would have adopted this ordinance irrespective of the invalidity of any particular portion thereof.

Section 4. All ordinances and parts of ordinances in conflict herewith are repealed insofar as such conflict may exist.

Section 5. This ordinance shall be published one time in the "Lodi News Sentinel", a daily newspaper of general circulation printed and published in the City of Lodi and shall be in force and take effect thirty (30) days from and after its passage and approval.

Approved this ____ day of _____, 1997

PHILLIP A. PENNINO
Mayor

Attest:

ALICE M. REIMCHE
Acting City Clerk

State of California
County of San Joaquin, ss.

I, Alice M. Reimche, City Clerk of the City of Lodi, do hereby certify that Ordinance No. 1650 was introduced at a regular meeting of the City Council of the City of Lodi held July 16, 1997, and was thereafter passed, adopted and ordered to print at a regular meeting of said Council held _____, 1997 by the following vote:

AYES: COUNCIL MEMBERS -

NOES: COUNCIL MEMBERS -

ABSENT: COUNCIL MEMBERS -

ABSTAIN: COUNCIL MEMBERS -

I further certify that Ordinance No. 1650 was approved and signed by the Mayor on the date of its passage and the same has been published pursuant to law.

ALICE M. REIMCHE
City Clerk

Approved as to Form:



RANDALL A. HAYS
City Attorney